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In The

Supreme Court of the United States

October Term, 1987

CNA FINANCIAL CORPORATION, CONTINENTAL ASSURANCE COMPANY, and CONTINENTAL CASUALTY COMPANY,

Petitioners,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR and DIRECTOR OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS OF THE UNITED STATES DEPARTMENT OF LABOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The instant case is what was described in *Chrysler Corporation v. Brown*, 441 U.S. 281 (1979), as a reverse-Freedom of Information Act case. At issue is the public disclosure by a federal agency of confidential, commercial data, which petitioners contend are exempt from disclosure under the FOIA, 5 U.S.C. § 552, and protected from disclosure by the Trade Secrets Act, 18 U.S.C. § 1905. The decision to disclose was based on a report, commissioned by the respondent agency, from a professor outside the government, which was neither placed in the record nor otherwise revealed to petitioners. The specific issues in the instant case, two of which were expressly left open in *Chrysler* (441 U.S. at 318-19 & n. 49), are:

1. When, if ever, is a private business entitled to *de novo* review of a factual determination by an agency that results in the release of its confidential, commercial data under the Freedom of Information Act, 5 U.S.C. § 552?

2. What is the scope of the Trade Secrets Act, 18 U.S.C. § 1905, and its relationship to Exemptions 3 and 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(3) and (b)(4)?

Assuming, *arguendo*, the absence of *de novo* judicial review:

3. When, if ever, is a private business entitled to receive from a federal agency adjudicating the disposition of property rights, notice of the issues, an indication of the evidence upon which the agency relies, and/or an opportunity to respond to the factual issues?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
A. The Decision Below Involves Important Questions Of Federal Law Which Have Not Been, But Should Be, Settled By This Court	7
1. *This is the leading reverse – Freedom of Information Act case now before the courts*	8
2. *It is important that this Court resolve the conflict among the courts below*	9
3. *The instant case presents issues of national importance regarding the confidentiality of private data submitted to the government*	12
B. The Administrative Procedures Approved By The Court Below Are Inconsistent With The Decisions Of This Court	14
CONCLUSION	16

TABLE OF AUTHORITIES

Cases: *Page*

Bowman Transportation, Inc. v. Arkansas-Best Freight System, 419 U.S. 281 (1974) 15

Brock v. Roadway Express, Inc., ___U.S.___, 45 U.S.L.W. 4530 (April 22, 1987) 15

Camp v. Pitts, 411 U.S. 138 (1973) 7, 11

Chrysler Corporation v. Brown, 441 U.S. 281 (1979) . . . . . *passim*

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 7, 11

CNA Financial Corporation, et al. v. Raymond J. Donovan, et al., 830 F.2d 1132 (D.C. Cir. 1987) . . . . . *passim*

General Electric Company v. United States Nuclear Regulatory Comm'n, 750 F.2d 1394 (7th Cir. 1984) 12

General Motors Corporation v. Marshall, 654 F.2d 294 (4th Cir. 1981) 9, 10, 12

Gonzales v. United States, 348 U.S. 407 (1955) 15

Greene v. McElroy, 360 U.S. 474 (1959) 15

Grumman Aircraft Engineering Corporation v. Renegotiation Board, 425 F.2d 578 (D.C. Cir. 1970) 12, 13

National Organization for Women v. Social Security Administration, 736 F.2d 727 (D.C. Cir. 1984). 6, 7, 10, 11

National Parks and Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974) 5, 6, 13, 14

Cases: *Page*

Ohio Bell Telephone Company v. Public Utilities Comm'n of Ohio, 301 U.S. 292 (1937) 15

Porter v. Califano, 592 F.2d 770 (5th Cir. 1979) 11

Ruckelshaus v. Monsanto Company, 467 U.S. 986 (1984) 11, 14

Sears, Roebuck and Co. v. Eckerd, et al., No. 76 C 2444 (N.D. Ill.) 8

Sears, Roebuck and Co. v. GSA, 553 F.2d 1378 (D.C. Cir.), *cert. denied*, 434 U.S. 826 (1977) 10

Simmons v. United States, 348 U.S. 397 (1955) 15

Texaco v. Marshall, C.A. No. 77-0875 (D.D.C.) 8

Texaco v. Andress, C.A. No. 78-0926 (D.D.C.) 8

Westinghouse Electric Corporation v. Brown, No. 78-3799-LEW (C.D. Cal.) 8

Westinghouse Electric Corporation v. Brown, No. 77-0613-LEW (C.D. Cal.) 8

Westinghouse Elec. Corporation v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977) 12, 14

STATUTES AND CONSTITUTIONAL PROVISIONS

Page

5 U.S.C. § 552 *et seq.*, The Freedom of Information Act . . . . . *passim*

5 U.S.C. § 706(2)(F) 9

18 U.S.C. § 1905, The Trade Secrets Act . . . . . *passim*

Fifth Amendment to the United States Constitution

MISCELLANEOUS

1 C.F.R. § 305.82-1 (July 15, 1982) 9

127 Cong. Rec. 10,714 (1981) (Sen. Dole) 9, 12, 13

Daily Labor Report (BNA) (October 2, 1987) 8

The Freedom Of Information Reform Act: Hearings Before a Subcomm. of the House Comm. on Government Operations, 98th Cong., 2d Sess. (1984) 7, 10, 13

Freedom of Information Act Amendments of 1986: Hearing on H.R. 4862 Before a Subcomm. of the House Comm. on Government Operations, 99th Cong., 2d Sess. (1986) 9

Note, *Protecting Confidential Business Information from Federal Agency Disclosure After Chrysler Corp. v. Brown*, 80 Colum. L. Rev. 109 (1980) . . . 9, 11

Page

J. O'REILLY, FEDERAL INFORMATION DISCLOSURE: PROCEDURES, FORMS AND THE LAW (1985) 8, 9, 10, 11, 13

Patten & Weinstein, *Disclosure of Business Secrets Under The Freedom of Information Act: Suggested Limitations*, 29 Admin.L.Rev. 193 (1977) 13

Stevenson, *Protecting Business Secrets Under The Freedom Of Information Act: Managing Exemption 4*, 34 Admin. L.Rev. 207 (1982) 7, 12

U.S. Department of Justice, Office of Information, Law and Policy, 1 FOIA Update 3 (Winter, 1980) 8

U.S. Department of Justice, Office of Information and Privacy, 6 FOIA Update 4 (Fall 1985) 8

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Petitioners,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR and DIRECTOR OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS OF THE UNITED STATES DEPARTMENT OF LABOR,
Respondents.[1]

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, CNA Financial Corporation, Continental Assurance Company, and Continental Casualty Company

[1] Pursuant to Rule 21.1(b), petitioners state that Plaintiffs-Appellants in the Court of Appeals were CNA Financial Corporation, Continental Assurance Company, and Continental Casualty Company. Defendants-Appellees were Raymond J. Donovan, Secretary of the United States Department of Labor, and Ellen M. Shong, Director of the Office of Federal Contract Compliance Programs of the United States Department of Labor.

(collectively "CNA"),[2] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on September 29, 1987.

OPINIONS BELOW

The opinion of the court of appeals (App. A, pp. 1-68) is officially reported as *CNA Financial Corporation, et al. v. Raymond J. Donovan, et al.*, 830 F.2d 1132 (D.C. Cir. 1987). The opinion is unofficially reported at 44 Empl. Prac. Dec. (CCH) ¶ 37,424. The October 29, 1981, opinion of the district court (App. A, pp. 130-41) is not officially reported. The opinion portion of the November 28, 1980, opinion and order of the Office of Federal Contract Compliance Programs (App. A, pp. 72-94) is unofficially reported at 24 FEP Cases 877, *sub nom. In re CNA Financial Corp.*. The July 17, 1981, Supplemental Decision of the Office of Federal Contract Compliance Programs (*In re CNA Financial Corp.*) (App. A, pp. 124-29) is not officially reported.

JURISDICTION

The judgment of the court of appeals for the District of Columbia Circuit was entered on September 29, 1987. App. A, p. 143. CNA's timely petition for rehearing was denied on December 1, 1987. App. A, p. 144. CNA's suggestion for rehearing *en banc* was denied on December 2, 1987. App. A, p. 145. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[2] Pursuant to Rule 28.1, petitioners submit the following list of their parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates: Bulova Watch Company, Inc.; Loews Corporation; and Lorillard, Inc.

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, provides, in relevant part:

> § 552. Public information; agency rules, opinions, orders, records, and proceedings
>
> * * *
>
> (b) This section does not apply to matters that are–
>
> * * *
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential. . . .

18 U.S.C. § 1905, sometimes referred to as the Trade Secrets Act, provides:

> § 1905. Disclosure of confidential information generally
>
> Whoever, being an officer or employee of the United States or of any department or agency thereof, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314), publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of

> any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without compensation.

STATEMENT OF THE CASE

This is a reverse-Freedom of Information Act case. The lengthy procedural history is set forth in detail in the court of appeals' opinion. 830 F.2d at 1134-37, 1156-59; App. A, pp. 3-9, 53-59. The facts can be summarized as follows.

Pursuant to Executive Order 11246, CNA was required to submit to the government various materials regarding its workforce as well as its plans for the future. In response to a Freedom of Information Act ("FOIA") request from Women Employed for public disclosure of those materials, CNA submitted to the Office of Federal Contract Compliance Programs (OFCCP)[3] detailed objections, including numerous expert affidavits and depositions which, CNA contended, established that the disputed data were confidential, commercial data, which if released, would cause substantial competitive harm.[4] The

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[3] OFCCP had assumed the enforcement responsibilities previously exercised by the Social Security Administration's Insurance Compliance Staff, the original agency to which the request was directed.

[4] CNA's evidence demonstrated, *inter alia*, that disclosing its data would (1) permit competitors to determine the markets and areas of the country CNA was contemplating entering, and, thus,

(Footnote continued on the following page)

OFCCP twice denied CNA's requests for an opportunity to confront the evidence against it, if any, and failed to provide CNA with notice of the bases on which the OFCCP proposed to act, and the issues it would be considering. Nor was CNA told during the administrative proceedings that the agency was relying on evidence outside the record – the report of a purported outside expert whose qualifications were never specified, and who had been engaged by the agency to determine the existence of the competitive threat CNA asserted. After CNA learned of the preparation of the report during the interim judicial proceedings, the agency refused to produce it, leaving an administrative record consisting only of the evidence submitted by CNA. Notwithstanding the absence of any controverting evidence in the record, the OFCCP decided to release the disputed data because it concluded that disclosure would not cause substantial competitive harm as defined by the District of Columbia Circuit in *National Parks and Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) ("*National Parks I*").

CNA had objected to the use of the *National Parks I* test, contending instead that the full scope of the Trade Secrets Act governed. CNA further contended that, even under the *National Parks* test, disclosure would inflict substantial competitive harm. Without any record evidence to the contrary, the agency "forecast[ed]" (830 F.2d at 1155; App. A., p. 51) the impact of disclosure on cost, marketing, and recruiting advantages in the insurance industry that CNA's competitors might obtain, employee raiding, and employee morale and productivity.

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4 *(Continued)*
minimize their own costs, (2) aid competitors in directing their recruiting efforts to the same sources utilized by CNA, (3) facilitate significant raiding of its key corporate personnel, and (4) adversely affect employee morale.

On October 29, 1981, the district court granted summary judgment in favor of the agency after finding that the OFCCP properly withheld the extra-record report it had utilized, that the OFCCP was not required to hold an evidentiary hearing and that *de novo* judicial review was not required.

On September 29, 1987, nearly six years after oral argument, the court of appeals affirmed. The court of appeals held that the Trade Secrets Act is not an exempting statute under Exemption 3 of the FOIA. 830 F.2d at 1137-43; App. A, pp. 10-24. While holding that the scope of the Trade Secrets Act "is at least co-extensive with that of Exemption 4 of FOIA . . . " (830 F.2d at 1151; App. A, p. 42), the court found that the OFCCP was correct in applying the *National Parks I* substantial competitive harm test. 830 F.2d at 1152-53; App. A, pp. 43-46. Regarding the report of the outside expert engaged by the OFCCP, the court concluded that, because the OFCCP had "encounter[ed] problems outside [its] ken," it was permissible to "enlist the help of outside experts skilled at unravelling their knotty complexities" (830 F.2d at 1162; App. A, p. 66) without permitting CNA either access to the report or an opportunity to rebut the testimony thereby elicited. Applying an "arbitrary, capricious or abuse of discretion" standard of review, the court held that the agency's decision as to competitive harm was one of the "judgments and forecasts courts traditionally leave largely to agency expertise. . . ." 830 F.2d at 1155; App. A, p. 51.

The court rejected CNA's procedural due process argument by referring to one of the opinions in a *per curiam* decision, *National Organization for Women v. Social Security Administration*, 736 F.2d 727 (D.C. Cir. 1984) ("*NOW*"), in which it was noted that the OFCCP review was "sufficient to allay concerns about fairness to the submitters of information." 830 F.2d at 1159; App. A, pp. 59-60. Finally, the court sustained the refusal to provide *de*

novo review, based on its reading of *Camp v. Pitts*, 411 U.S. 138 (1973), and *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), together with the opinion in *NOW*. 830 F.2d at 1162; App. A, pp. 66-67.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Involves Important Questions Of Federal Law Which Have Not Been, But Should Be, Settled By This Court.

The resolution of the instant case has been long awaited by the courts, government and business. *See* p. 8, *infra*. This case presents the significant reverse-FOIA issues reserved in *Chrysler Corporation v. Brown*, 441 U.S. 281 (1979): (1) whether a submitter is entitled to *de novo* review of agency action in the district court when material factual disputes exist as to the protected nature of confidential, commercial data, (2) the "relative ambits" of FOIA Exemption 4 and the Trade Secrets Act, and (3) whether the Trade Secrets Act is an exempting statute under FOIA Exemption 3. 441 U.S. at 318-19 & n. 49. As the court of appeals recognized, this case presents "important" and "difficult questions . . . never squarely decided" prior to this action. 830 F.2d at 1133-34; App. A, pp. 2-3. Indeed, "[p]erhaps the most significant effect of *Chrysler*," as one commentator has noted, "was that it did not answer many of the questions that needed to be addressed." [5] The resultant "uncertainty . . . and the lack of guidance" [6] has created enormous practical difficulties. As the Justice Department

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[5] *The Freedom Of Information Reform Act: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 98th Cong., 2d Sess. 287 (1984) (statement of Burt Braverman, Cole, Raywid & Braverman, Washington, D.C.).

[6] Stevenson, *Protecting Business Secrets Under The Freedom of Information Act: Managing Exemption 4*, 34 Admin. L.Rev. 207, 247 (1982).

noted shortly after *Chrysler*, that decision "leaves several crucial issues undecided, making it impossible to provide a comprehensive and certain statement of what [is] the law" involved.[7]

1. *This is the leading reverse-Freedom Of Information Act case now before the courts.* Over six years ago the instant case was argued orally before the court of appeals below. Since that time the government, the district courts across the nation, and businesses submitting data to the government have waited for the "outcome on review" [8] of the instant case. Numerous reverse-FOIA cases were held in abeyance pending resolution of this case.[9] Two years ago, the government voiced its concern that this case, "involv[ing] issues of significance [was] still pending after all these years." [10] This case, therefore, is the appropriate opportunity for resolution of the unanswered questions of *Chrysler* and the substantial uncertainty they have caused.[11]

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[7] U.S. Department of Justice, Office of Information, Law and Policy, 1 FOIA Update 3 (Winter, 1980).

[8] J. O'REILLY, FEDERAL INFORMATION DISCLOSURE: PROCEDURES, FORMS AND THE LAW 10-26 (1985).

[9] See the Joint Status Reports in *Sears, Roebuck and Co. v. Eckerd, et al.*, No. 76 C 2444 (N.D. Ill.) (App. C, pp. 1-4); *Westinghouse Electric Corp. v. Brown*, No. 77-0613-LEW (C.D. Cal.); and *Westinghouse Electric Corp. v. Brown*, No. 78-3799-LEW (C.D. Cal.) (App. C, pp. 5-12). Petitioners are also advised that *Texaco v. Marshall*, C.A. No. 77-0875 (D.D.C.) and *Texaco v. Andress*, C.A. No. 78-0926 (D.D.C.) are being held in abeyance at the agency level pending a decision in the instant case. Additionally, the Department of Labor reports that at least a dozen similar cases are currently pending in the district courts. Daily Labor Report (BNA) A-6 (October 2, 1987).

[10] U.S. Dept. of Justice, Office of Information and Privacy, 6 FOIA Update 4 (Fall 1985).

[11] It has been suggested that the current ambiguities in case law

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2. *It is important that this Court resolve the conflict among the courts below.* The availability of *de novo* review of agency decisions in reverse-FOIA cases "has become one of the major debated points in both legislative and litigative arenas." [12] As the Fourth Circuit noted in *General Motors Corp. v. Marshall*, 654 F.2d 294, 298 & n. 13 (4th Cir. 1981), the existing confusion is due to the failure to squarely confront this issue in *Chrysler*.

In *Chrysler*, this Court noted that *de novo* review is "*ordinarily not necessary* to decide whether a contemplated disclosure runs afoul of § 1905" (emphasis added), but also cited 5 U.S.C. § 706(2)(F), which provides for *de novo* review of agency action in some circumstances. 441 U.S. at 318.[13] This has resulted in great

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11 *(Continued)*
under the FOIA "encourage those who use it for their own private economic gain." *Freedom of Information Act Amendments of 1986. Hearing on H.R. 4862 Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 2d Sess. 26 (1986) (statement of Jack Pulley, Chemical Specialities Manufacturers Assoc.). After *Chrysler*, the Administrative Conference of the United States observed that "[s]ubmitters are insecure about the degree of protection their information will receive when it is in the government's possession," and that this situation hinders agency collection of private information "due to reluctance on the part of submitters to trust that the government will not disclose valuable documents." 1 C.F.R. § 305.82-1 (July 15, 1982). Senator Dole has submitted that *Chrysler* caused the FOIA to be "transformed from a mechanism by which citizens could learn about the operations of their Government into an instrument for industrial espionage." 127 Cong. Rec. 10, 714 (1981) (remarks of Sen. Dole).

[12] O'Reilly, *supra* note 8, at 10-32.

[13] *See* Note, *Protecting Confidential Business Information from Federal Agency Disclosure After Chrysler Corp. v. Brown*, 80 Colum. L. Rev. 109, 122 (1980), which concludes:

The implication of the first dictum seems plain: courts

(Footnote continued on the following page)

uncertainty.[14]

The courts of appeals have expressed inconsistent opinions interpreting the availability of *de novo* review. *General Motors Corp. v. Marshall*, 654 F.2d at 298-99 (4th Cir. 1981), emphasized that the necessity for *de novo* review was a function of the complexity of the factual issues presented. The court concluded that the "ordinarily not necessary" language of *Chrysler* merely referred to cases where "the relevant facts are undisputed, [and the application of the Trade Secrets Act] becomes one of law" only. *Id.* at 298. By contrast, the District of Columbia Circuit in the instant case, faced with complex factual issues involving competition in the insurance business, industrial psychology, and organizational theory denied *de novo* review.[15] Instead, the court of appeals adopted, by reference to the *NOW* major-

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13 *(Continued)*

> reviewing agency decisions to disclose exempt information may sometimes proceed de novo, rather than on the agency record.

[14] One observer has testified that

> [t]he failure of the Court to resolve this controversy was troublesome not only because of the uncertainty which it left in the law governing reverse FOIA actions, but also because of the perception which it fostered among submitters that they would not be afforded an adequate opportunity for judicial review of their confidentiality claims.

Braverman statement, *supra* note 5, at 325. Indeed, the denial of *de novo* review in the instant case has only "increased the uncertainty and procedural problems for submitters." O'Reilly, *supra* note 8, at 10-26.

[15] The District of Columbia Circuit has previously recognized that the significance of commercial data "to an intelligent competitor is a factual issue." *Sears, Roebuck and Co. v. GSA*, 553 F.2d 1378, 1382 (D.C. Cir.), *cert. denied*, 434 U.S. 826 (1977). In the instant case, the record evidence was limited to affidavits and depositions submitted by CNA regarding competition, industrial psychology, and organizational theory, pertaining to the factual issue of likelihood of competitive injury.

ity opinion, a holding that "procedures must be severely defective before a court . . . can substitute *de novo* review for review of the agency's record" in a reverse-FOIA case. 830 F.2d at 1162; App. A, pp. 66-67; *NOW*, 736 F.2d at 745; App. B, p. 41. The creation of a "severely defective" threshold for *de novo* judicial review is novel. The court suggested that the answer to the *Chrysler dictum* is found in *Citizens to Preserve Overton Park*, 401 U.S. at 414-15, and *Camp v. Pitts*, 411 U.S. at 142, which indicate the appropriateness of *de novo* review when agency procedures are "inadequate"; yet the "severely defective" test creates a more stringent standard.

At issue in a reverse-FOIA case is the adjudication of property rights. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984). Accordingly, this new test for judicial review is not consistent with, for example, the Fifth Circuit's decision in *Porter v. Califano*, 592 F.2d 770, 784 (5th Cir. 1979), where the Court, addressing, as in the instant case, a factual determination in an adjudicatory context, approved *de novo* review under *Overton Park* because agency procedures merely "were inadequate." Engrafting a higher "severely defective" standard, as the District of Columbia Circuit did in the instant case, without regard to the factual nature of the issues, creates a conflict among the circuits that should be resolved.

The instant case is a particularly appropriate vehicle to resolve the puzzle created by *Chrysler's* "cryptic dicta." [16] The failure to provide *de novo* review in this case has been described as the result of a "misguided theory" under which "valuable rights essentially adjudicated by [the administrative] process are lost . . . ." [17] The "procedural rights of submitters" hang in the balance.[18]

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[16] Note, *supra* note 13, at 124.

[17] O'Reilly, *supra* note 8, at 10-31 to 10-32.

[18] *Id.*

3. *The instant case presents issues of national importance regarding the confidentiality of private data submitted to the government.* The relationship between the Trade Secrets Act, § 18 U.S.C. § 1905, and Exemption 4 of FOIA, 5 U.S.C.§ 552(b)(4), at issue in the instant case and left open by *Chrysler*, will determine the degree to which the FOIA is "a vehicle for surveillance, at public expense, of the private affairs of commercial enterprises by their adversaries." [19] The existing uncertainty is one of *Chrysler's* "principal difficulties." [20] In *Chrysler*, this Court suggested in *dictum* that the scopes of § 1905 and Exemption 4 are, in effect, the same. 441 U.S. at 319 n. 49.[21] That scope determines what disclosure would not be "in accordance with law" *(id.* at 318) and hence protected from public dissemination pursuant to FOIA.

Originally § 1905 was viewed as creating "a criminal sanction for the release of 'confidential information.' " *Grumman Aircraft Engineering Corporation v. Renegotiation Board*, 425 F.2d 578, 580 n. 5 (D.C. Cir. 1970). Prior

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[19] Remarks of Sen. Dole, *supra* note 11. Senator Dole noted that "businesses have been organized for the sole purpose of making blanket FOIA requests and selling the business information gleaned from the released records." *Id.* In fact, more than three out of five FOIA requests were from the business community. *Id.*

[20] Stevenson, *supra* note 6, at 247.

[21] The Fourth Circuit, both before and after *Chrysler*, has ruled that the scope of § 1905 and Exemption 4 are " 'the same,' " or "co-extensive.' " *Westinghouse Electric Corporation v. Schlesinger*, 542 F.2d 1190, 1204 n.38 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977); *General Motors Corp.*, 654 F.2d at 297. In the instant case, the court of appeals found that the scope of the Trade Secrets Act "is *at least* co-extensive with that of Exemption 4. . . ." 830 F.2d at 1151; App. A, p. 42 (emphasis added). The Seventh Circuit has held that if a document "is not protected by exemption 4, even more clearly is it not protected by section 1905 either." *General Electric Co. v. United States Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1402 (7th Cir. 1984).

to *National Parks I*, it was concluded that all of the data covered by the historic interpretation of § 1905 was also protected from disclosure by Exemption 4. In the instant case, by contrast, the court of appeals concluded that the *National Parks I*, "substantial competitive harm" test was the appropriate standard "summoned by FOIA Exemption 4." 830 F.2d at 1152; App. A at p. 43. This is a different test than that suggested in *Chrysler;* if § 1905 and Exemption 4 have the same breadth, the *National Parks I* criterion cannot be appropriate unless it also modifies the plain language of § 1905, a criminal statute.[22] The continued viability of the *National Parks I* test is, therefore, necessarily intertwined with the question of the "relative ambits" (*Chrysler*, 441 U.S. at 319 n. 49), of § 1905 and Exemption 4, and warrants resolution by this Court.[23]

Another question undecided by *Chrysler* and presented by the instant case, whether § 1905 is an exempting statute under FOIA Exemption 3 (441 U.S. at 319 n. 49), goes hand in hand with the Exemption 4 question, and should now be addressed. Indeed, prior to *National Parks I*, the District of Columbia Circuit refused to consider § 1905 as an exempting statute under Exemption 3 only because, as noted above, the court believed "confidential information" already was protected by Exemption 4. *Grumman Aircraft*

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[22] One writer has noted that it is unlikely that Congress intended § 1905 to penalize the taking of " 'substantial' property and not 'insubstantial property,' " because Congress does not hesitate to state the distinction between property of different values when it intends to create such a distinction. O'Reilly, *supra* note 8, at 10-68 n. 7.

[23] The *National Parks* test has been called a "blow to the protection of confidential business information" (Braverman statement, *supra* note 5, at 286) and has been criticized as contrary to congressional intent. Remarks of Sen. Dole, *supra* note 11, at 10, 715. *See also* Patten & Weinstein, *Disclosure of Business Secrets Under The Freedom of Information Act: Suggested Limitations*, 29 Admin.L.Rev. 193, 195-202 (1977).

Engineering Corp. v. Renegotiation Board, 425 F.2d at 580 n. 5. If *National Parks I* and its application in this case are correct, however, a gap will exist requiring disclosure of confidential business information under FOIA despite the unrestricted language of § 1905 prohibiting release of such data. Conversely, if, as the Fourth Circuit held in *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d at 1203, "§ 1905 is a statute qualifying under Exemption 3," that gap is closed. The need to resolve that question is, therefore, an additional reason for granting the present petition.

B. The Administrative Procedures Approved By The Court Below Are Inconsistent With The Decisions Of This Court.

The procedures applied by the OFCCP are of importance to every government contractor and subcontractor, all of whom are subject to the OFCCP. This case required factual determinations as to whether substantial competitive harm was likely to result from the release of CNA's business data.[24] Such confidential business plans constitute valuable property rights. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1002. Hence, absent the safeguard of *de novo* judicial review, the adjudication of those rights without notice of the issues and without access to the agency's evidence presents issues which should be decided.

This Court has made it clear that "where government action seriously injures an individual, and the reasonableness of the action depends on fact-findings, the evidence

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[24] As noted earlier (*see* note 4 and p. 10, *supra*), CNA presented substantial expert evidence in the areas of competition in the insurance business, industrial psychology and organizational theory. As an example, one expert explained that competitors could use the disputed data to extrapolate CNA's labor costs in particular operations and obtain valuable information on CNA's overall business strategies. Affidavit of Dr. Marcus Cook Bogue III, Joint Appendix below, p. 51. Such information would not otherwise be available to CNA's competitors.

used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene v. McElroy*, 360 U.S. 474, 496 (1959).[25] Additionally, "[a] party is entitled . . . to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it." *Bowman Transportation, Inc. v. Arkansas-Best Freight System*, 419 U.S. 281, 288 n. 4 (1974). Those precepts are starkly at odds with the process the OFCCP afforded CNA to defend its property rights before the agency decided to release CNA's data. In the instant case, no evidence contradicting CNA's affidavits was adduced on the record, and the agency refused to reveal the report on which it relied. The OFCCP's refusal both to disclose all of the evidence on which it relied and to identify the purported deficiencies in CNA's affidavits and exhibits contravened *Ohio Bell Telephone Company v. Public Utilities Comm'n of Ohio*, 301 U.S. 292, 300 (1937), and *Brock v. Roadway Express, Inc.*, ___U.S.___, 55 U.S.L.W. 4530 (April 22, 1987).[26] Like *Ohio Bell*, the "deeper vice is this, that even now we do not know the particular or evidential facts of which [the OFCCP's outside expert] took judicial notice and on which [he] rested [his] conclusion. Not only are the facts unknown; there is no way to find them out." 301 U.S. at 302.

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[25] *See also Gonzales v. United States*, 348 U.S. 407, 413-14 (1955) (petitioner entitled to know thrust of agency's recommendations so he can muster facts and arguments to meet them); and *Simmons v. United States*, 348 U.S. 397, 405 (1955) (notice of adverse charges essential to basic fairness).

[26] In *Brock*, this Court held that a Department of Labor order of preliminary reinstatement of a discharged employee under the Surface Transportation Assistance Act, 49 U.S.C. § 2305, deprived the employer of due process because it "was denied access to the information upon which the Secretary based the order for [the employee's] preliminary reinstatement."___U.S. at___, 55 U.S.L.W. at 4533.

In sum, this Court should correct what, we submit, is an erroneous interpretation of threshold due process requirements. Otherwise agencies will be permitted to adjudicate factual questions affecting substantial property rights based on secret evidence.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

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Respectfully submitted,

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